

1 The Honorable Marsha J. Pechman

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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10	DIANNE KELLEY and KENNETH HANSEN,)	No. C 07-475 MJP
11	Plaintiffs,)	
12	v.)	MICROSOFT'S OPPOSITION TO
13	MICROSOFT CORPORATION, a Washington)	PLAINTIFFS' MOTION FOR
14	corporation,)	CLASS CERTIFICATION
15	Defendant.)	<i>Noted for Consideration:</i>
16		December 19, 2007
17		<i>Oral Argument Requested</i>

18 ***FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (DKT. 57)***
19 ***AND PENDING MOTION TO SEAL***

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REDACTED VERSION

MICROSOFT'S OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION (No. C07-475 MJP)

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I. INTRODUCTION

In their Motion for Class Certification [Dkt. No. 65], plaintiffs ask the Court to certify a nationwide class of anyone who bought (a) a PC that had a “Windows Vista Capable” sticker on it but was not designated as “Premium Ready” and/or (b) a PC with an “Express Upgrade” to Windows Vista Home Basic. Plaintiffs’ Motion, however, discusses only a single element of the Windows Vista Capable (“WVC”) program, focusing on a small (less than a square inch) sticker that PC manufacturers (“OEMs”) affixed to some PCs sold before Windows Vista launched in January 2007. But Microsoft, OEMs, retailers and the media disseminated a wealth of other information concerning the WVC program—on Web sites, in stores, in newspapers, in periodicals, and on the boxes containing “Windows Vista Capable” PCs—publicizing the very facts plaintiffs say the three-word sticker misrepresented. PC buyers had access to detailed information about the various editions of Windows Vista, the meaning of the “Windows Vista Capable” sticker, the significance of the “Premium Ready” designation, and the specific Windows Vista features that a particular PC could run.

Microsoft does not claim that every member of the putative class read every one of these resources about the WVC program—or even saw the sticker on which plaintiffs rest their case. But that is exactly the point: as the depositions of Ms. Kelley and Mr. Hansen show, one cannot tell who saw what, and what role the information played in a particular purchasing decision, without individual examinations and fact-finding. On this record, then, the Court should deny class certification for four reasons:

First, as the Washington Supreme Court held last month in *Indoor Billboard/Washington, Inc. v. Integra Telecom*, 2007 WL 3025836 (Wash. Oct. 18, 2007), a plaintiff cannot recover for allegedly deceptive conduct without establishing that, *but for* that conduct, the plaintiff would not have suffered the claimed injury. This requirement of “but for” causation presents uniquely individual issues here. PC purchasers act with individual motivations and base purchasing decisions on information and criteria specific to their personal needs and budgets. In adjudicating plaintiffs’ claims, a finder of fact would have to decide which

1 proposed class members bought PCs without knowing about the Windows Vista Capable
 2 sticker; which ones bought after reading some of the available information and got what they
 3 wanted; which ones bought without ever intending to upgrade to a new operating system at
 4 all; and which ones bought based on an incomplete investigation and wound up with less than
 5 they hoped. The need for an inquiry into each putative class member's purchase decision
 6 means that plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement.

7 *Second*, neither plaintiff bought a PC with an "Express Upgrade" to Windows Vista
 8 Home Basic. Disposition of the plaintiffs' claims therefore will not shed light on the claims
 9 of proposed class members who have complaints about the "Express Upgrade" promotion.
 10 Plaintiffs cannot satisfy Rule 23(a)'s "typicality" requirement for certification of those claims.

11 *Third*, as explained in Microsoft's Opposition to Plaintiffs' Motion for Application of
 12 Washington Law, courts routinely decline to certify nationwide classes on state law claims.
 13 Because the Court cannot apply Washington law to the class claims, the Court should join
 14 most courts in holding that plaintiffs cannot litigate on behalf of a nationwide class here.

15 *Fourth*, plaintiffs have not satisfied Rule 23(b)(3)'s requirement that a class action be
 16 "superior to other available methods for the fair and efficient adjudication of the controversy."
 17 If this case were certified for class treatment, the Court would spend most of its time resolving
 18 issues peculiar to each individual class member.

19 II. STATEMENT OF FACTS

20 A. Microsoft, OEMs, Retailers and the Press Informed Consumers about 21 What "Windows Vista Capable" Meant.

22 Microsoft does not sell PCs. Instead, it licenses operating system software to PC
 23 manufacturers ("OEMs"), who preinstall the operating system and sell their PCs to
 24 consumers, online and through retail stores such as CompUSA, Staples, and Office Depot.
 25 PC purchasers run the gamut from consumers who want only the basic PC functions that a
 26 bargain PC provides, to sophisticated users who require advanced hardware to run complex
 27 applications. Microsoft therefore created different editions of the Windows Vista operating

1 system, so that OEMs could make available a basic version to buyers of inexpensive PCs who
 2 want the ability to send e-mail, create documents, play music and videos, and browse the
 3 Internet, while making premium versions available to those who want to perform more
 4 sophisticated tasks on more advanced and expensive PCs. *See* Gatchalian Decl. ¶ 3.

5 Plaintiffs ignore the comprehensive marketing campaigns through which Microsoft,
 6 OEMs, retailers and others provided consumers with detailed information on the different
 7 versions of Windows Vista and the “Windows Vista Capable” program. Instead, plaintiffs
 8 focus on the tiny three-word logo that played only a small role in that process. In fact,
 9 Microsoft created, and OEMs and retailers used, marketing materials, sales aids and training
 10 materials that described what features the different Windows Vista editions would provide—
 11 and explained that not every WVC computer would be able to provide every advanced feature
 12 available in every edition of Windows Vista, including the new “Aero” user interface.

13 **Microsoft:** Months before Ms. Kelley and Mr. Hansen bought their laptops, Microsoft
 14 implemented an extensive media plan to tell consumers about the upcoming release of its new
 15 Windows Vista operating system. Burk Decl. ¶¶ 3, 4. On May 18, 2006, Microsoft issued a
 16 press release announcing (a) the WVC program to assist consumers in identifying PCs that
 17 could be upgraded to the new operating system when it was released, and (b) the Windows
 18 Vista “Get Ready” Web site to educate consumers about the different editions of Windows
 19 Vista and Windows Vista Capable PCs. *Id.* ¶¶ 4-5 & Ex. A. The press release, backed by
 20 briefings to reporters and analysts, referred the public to Microsoft’s “Get Ready” Web site
 21 for “a variety of information and tools customers can use to prepare for Windows Vista,”
 22 including “information on Windows Vista Capable and Windows Vista Premium Ready
 23 PCs ... and background on the different editions of Windows Vista.” *Id.* ¶¶ 4-11 & Ex. A.

24 From the inception of the WVC program, Microsoft emphasized that not all Windows
 25 Vista Capable PCs were equal. Every edition of “Windows Vista will deliver innovations in
 26 core operating system experiences, including security, reliability and management of the PC,
 27 organizing, managing and finding information, and methods for connecting with people,

1 places and devices.” *Id.*, Ex. A. But, as Microsoft *repeatedly* told the public, “premium
 2 features and advanced experiences,” such as Windows Aero (the new user interface plaintiffs
 3 say their PCs could not support) would require a PC labeled “Premium Ready”:

4 Premium editions of Windows Vista—such as Windows Vista Home
 5 Premium, Windows Vista Business or Windows Vista Ultimate—will
 6 offer even more value by delivering premium features and advanced
 experiences

7 A Premium Ready designation ensures that the PC will deliver even
 8 better Windows Vista experiences, including Windows Aero™, a new
 user experience designed to deliver a productive, high-performing
 desktop interface.

9 ***Microsoft recommends that customers seeking the best experiences***
 10 ***with Windows Vista ask for PCs that are Premium Ready or choose***
PCs that meet or exceed the Premium Ready requirements.

11 *Id.* (emphasis added). Neither plaintiff chose to pay for a Premium Ready PC.

12 Microsoft’s “Get Ready” Web site remained available to consumers from May 2006
 13 until months after these plaintiffs bought their PCs. The Web site told potential PC buyers
 14 that “the Windows Vista experience” could “vary on different PCs,” explaining that although
 15 “[a]ll Windows Vista Capable PCs will be able to run at least the core experiences of
 16 Windows Vista,” all “Windows Vista Premium Ready PCs can deliver even better Windows
 17 Vista experiences, including the new Windows Aero user experience.” *See* Therrien Decl.,
 18 Ex. A. The “Get Ready” Web site included links to pages that identified which Windows
 19 Vista features would be available only in premium editions. *Id.* (identifying “Windows Aero,
 20 Windows Flip 3D navigation, Scheduled and Network Backup, Windows Meeting Space, and
 21 Tablet Technology” as available *only* in premium editions of Windows Vista).

22 On October 24, 2006, Microsoft issued a press release and briefed reporters and
 23 analysts about the Express Upgrade to Windows Vista program. Burk Decl. ¶¶ 12-13 & Ex.

24 B. Rather than promote the sale of bargain PCs, the press release featured Microsoft’s
 25 recommendation that “buyers consider Windows Vista Capable PCs that are designated
 26 Premium Ready” because those PCs “can deliver the core Windows Vista experiences, plus
 27

1 features such as the Windows Aero™ user experience and Media Center.” *Id.*, Ex. B. The
 2 press release noted that “[s]ome functionalities require specific hardware components.” *Id.*

3 **OEMs:** OEMs had the option to use the Windows Vista Capable logo on PCs that met
 4 the program’s specifications.

5
 6 REDACTED

7
 8 Toshiba, for example, designed a Web page that answered the question “What is
 9 the Windows Vista Capable Logo?” REDACTED

10 *Not all Windows® Vista™ features are available for use on all*
 11 *Windows® Vista™ Capable PCs. All Windows® Vista™ Capable*
 12 *PCs will run the core experiences of Windows® Vista™, such as*
 13 *innovations in organizing and finding information, security, and*
 14 *reliability. Some features available in premium editions of*
Windows® Vista™ -- like the new Windows® Aero™ user interface
-- require advanced or additional hardware. Check
www.windowsvista.com/getready for details.

15 Rummage Decl. ¶ 3 & Ex. B at 63 (italics in original; bold added). Other OEMs took
 16 comparable steps. *See, e.g.,* Riquelmy Decl. ¶¶ 5-7 & Exs. 5-8 (Dell); Chim Decl. ¶¶ 4-11 &
 17 Ex. 1-8 (Hewlett Packard); Rummage Decl. ¶ 3 & Ex. B at 60, 62, 70, 71, 74, 80-81, 82, 87
 18 (other OEM disclosures).

19 OEMs provided consumers with ample information about the WVC program.

20
 21 REDACTED

22
 23
 24 OEMs posted information on
 25 their Web sites. For example, Dell created several Web pages about Windows Vista and
 26 “Windows Vista Capable” systems. *See* Riquelmy Decl. ¶¶ 3-6 & Exs. 1-7. Long before Ms.
 27 Kelley bought her Dell laptop, Dell’s Web site explained that “[s]ystems without the required

1 graphics driver or enough system memory can still meet the minimum requirements for
 2 running Vista, just *without the new Windows Aero visual experience.*” *Id.* ¶ 4 & Ex. 1
 3 (emphasis added); *see also id.* Ex. 2-4. Dell also explained the difference between a
 4 “Windows Vista Capable” PC and one that was also designated “Premium Ready.” *Id.* ¶ 5 &
 5 Ex. 5. Dell’s Web site included links to pages describing the WVC program and one entitled
 6 “How Can I Be Sure I Get a PC that Meets the Windows Vista and Windows Aero
 7 Requirements?” *Id.* ¶¶ 4-5 & Ex. 1-2, 4-5. Dell’s Web site even showed consumers which of
 8 its computers could run the “Basic Windows Vista Experience” and which could run the
 9 “Windows Aero Experience.” *Id.* ¶ 4 & Ex. 2.¹ Dell was not alone: other OEMs likewise
 10 told consumers which of their computers were “Windows Vista Capable” and which were
 11 “Windows Vista Premium Ready.” *See, e.g.,* Rummage Decl. ¶ 3 & Ex. B at 58-59
 12 (eMachines); 66-67 (Acer); 78-79 (Fujitsu); 85-86 (Lenovo).

13 **Retailers:** Although Microsoft did not have a direct relationship with retailers, it gave
 14 them marketing materials designed to “[e]nsure that consumers are purchasing the right PC in
 15 order to get the Windows Vista experience and feature set that was right for them” should
 16 they decide to upgrade in the future. Tindall Decl. ¶¶ 1, 2, 6. Microsoft prepared Point of
 17 Purchase (or “POP”) and training materials for retailers and engaged Mosaic Sales Solutions
 18 to bring and position the POP materials at retailers’ stores. Tindall Decl. ¶ 6. Participating
 19 retailers included CompUSA, Wal-Mart, Office Depot, Staples, Sam’s Club, J&R Music and
 20 Computer World, BJ’s Wholesale Club, Fred Meyer, Fry’s Electronics, and Nebraska
 21 Furniture Mart, a Midwestern retailer. *Id.*; *see* Hodges Decl. ¶¶ 3-11 & Ex. 1-6 (CompUSA).

22 These POP materials were neither subtle nor hidden. They included brochures, fact
 23 cards, “monitor blades” (affixed to the screens of PCs on display), and “tent cards” (which
 24 stood on PC display shelves), all designed to grab attention and inform customers about the
 25 WVC program. Rather than promote low-end computers that could run only the core features

26 ¹ Dell identified the Dell Inspiron B130—the laptop that Ms. Kelley purchased—as capable of running
 27 the “Basic Windows Vista Experience,” as long as it had 512 MB of system memory, but specifically
 noted that it could *not* deliver the “Windows Aero Experience.” Riquelmy Decl. Ex. 2.

1 of Windows Vista (as plaintiffs imply), the POP materials touted Premium Ready PCs for the
 2 more advanced Windows Vista experiences they could deliver. The brochures, tent cards, and
 3 facts cards, for example, explained that:

4 When you purchase a PC with the Windows Vista Capable sticker on
 5 it, your PC will deliver core experiences such as innovations in
 6 organizing and finding information, security, and reliability. All
 7 Windows Vista Capable PCs will run these core experiences at a
 8 minimum. For even better experiences that come with the premium
 editions of Windows Vista, *including the Windows Aero user
 experience, ask for Windows Vista Premium Ready PCs*. Premium
 editions are Windows Vista Home Premium, Windows Vista Business
 and Windows Vista Ultimate.

9 Tindall Decl. ¶ 4 & Exs. B-D (emphasis added); *see also* Hodges Decl. ¶¶ 4-10 & Ex. 2-6
 10 (CompUSA). All of these materials provided Microsoft's "Get Ready" Web site address,
 11 where customers could obtain more information about Windows Vista editions and determine
 12 which features their PCs would support if they decided to upgrade, and most included a chart
 13 summarizing the features of each Windows Vista version. *See* Tindall Decl. ¶ 4 & Exs. B-D.
 14 (Plaintiffs' counsel prematurely referred to such a chart at argument on the Motion to
 15 Dismiss, tacitly admitting that it accurately compared Windows Vista Home Basic to
 16 Windows Vista Home Premium.) Retail store employees were trained to use these materials
 17 to assist customers in deciding which PC to buy. Hodges Decl. ¶¶ 5-11 (CompUSA).

18 Like OEMs, many retailers also provided detailed information on "Windows Vista
 19 Capable" and "Premium Ready" PCs on their Web sites. *See* Hodges Decl. ¶¶ 12-13 & Ex. 7-
 20 8 (CompUSA); Rummage Decl. ¶ 3 & Ex. B at 82-83 (Staples).

21 ***The Press:*** As one would expect, the press covered (and critiqued) Windows Vista
 22 and the WVC program. After Microsoft announced a delay in the release of Windows Vista
 23 in March 2006, scores (possibly hundreds) of journalists published articles about Windows
 24 Vista and the WVC Program. The press highlighted the variations in Windows Vista editions
 25 and offered advice to the purchasing public. For example, a March 31, 2006 issue of *PC*
 26 *World*, entitled "No Vista, but 'Vista Capable' Stickers Instead," explained that
 27

1 the requirements met by Windows Vista Capable PCs will allow
 2 customers to run Windows Vista Home Basic, according to Microsoft.
 3 **However, they do not represent the minimum hardware**
 4 **requirements for higher-end versions of Vista,** requirements
 Microsoft says it will provide in the future as the program expands.

5 * * *

6 [A] machine branded "Windows Vista Capable" that is a high-end
 7 Media Center PC with superior graphics capabilities will be ready for
 8 even the most feature-intensive versions of Vista ... **But if it's a low-**
 9 **cost PC and it has a "Capable" sticker on it, "it will probably run**
 10 **the features of Home Basic but not anything else,"** [one expert]
 11 warns.

12 Rummage Decl. ¶ 2 & Ex. A at 25 (emphasis added).² For those not as tech-savvy, daily
 13 newspapers ran similar stories. *The New York Times* "Technology" section on April 20, 2006
 14 advised whether consumers should "wait until the new version of Windows comes out":

15 If you don't want to wait, you can look for a new computer that has
 16 been qualified as "Windows Vista Capable," **which means that it has**
 17 **the minimum hardware components necessary to run the most basic**
 18 **versions of Windows Vista.**

19 Like Windows XP, though, the new operating system will be
 20 available in several different versions for business and home users,
 21 and each version may have slightly different requirements. **Some**
 22 **higher-end versions of Vista may require a more robust processor**
 23 **and graphics card than the most basic edition needs.**

24 Rummage Decl. ¶ 2 & Ex. A at 23 (emphasis added). The article directed readers to
 25 Microsoft's Web site, which outlined the "good, better and best hardware to use with a future
 26 Vista system." *Id.* Similarly, articles in the November 2006 and January 2007 issues of
 27 *Consumer Reports* carefully distinguished between Windows Vista Capable PCs and
 "[s]ystems called Windows Vista Premium Ready," which can "run Vista's Aero interface."
Id. Ex. B at 9. "Look for either a Windows Vista Capable or Premium Ready logo. The
 former provides enough power to run the Basic version of Vista, while the latter lets you
 effectively run higher-end Vista versions—Home Premium and Ultimate." *Id.*, Ex. B at 16.

² Even one of the articles plaintiffs attach to their motion, titled "PC maker fumes at Vista price hike," advises consumers of the difference between Vista Home Basic and other versions of the operating system. In particular, the article tells readers that the "Basic" version of Windows Vista includes "no [Aero] graphics, no Media Center, no remote control." Tilden Decl. [Dkt. No. 66] Ex. E.

B. Windows Vista Home Basic Edition Provides Material Improvements over Microsoft's Earlier Windows XP Home Edition.

Inevitably influenced by the wealth of information available, [REDACTED] people have acquired Windows Vista Home Basic, either as the pre-installed operating system on a newly purchased PC or as an upgrade to their existing Windows XP operating system. *See* Moline Decl. ¶ 5. (Indeed, to this day, OEMs and retailers advertise Windows Vista Home Basic as the pre-installed operating system on bargain PCs. *See* Rummage Decl., Ex. C.) Plaintiffs cannot plausibly claim that, despite the widespread publicity, all [REDACTED] knew nothing about the meaning of the Windows Vista Capable logo or the Premium Ready designation.³

Windows Vista Home Basic represents a major advancement over Microsoft's earlier operating systems, delivering improvements in core PC functions, including "innovations in organizing and finding information, security, and reliability." Gatchalian Decl. ¶¶ 6-7. In addition, Windows Vista Home Basic contains attractive extras such as "gadgets" on the screen to show time, weather, and traffic conditions, and more advanced parental controls to restrict and monitor children's PC usage and Web browsing. *Id.* The Court need not decide whether *every* potential class member had full knowledge of (or even cared about) these capabilities of Windows Vista Home Basic. Based on the record, the Court has every reason to believe that many members of the proposed class (including Ms. Kelley) bought a Windows Vista Capable PC that was not Premium Ready for the most elemental of reasons: a non-Premium Ready PC costs less and effectively performs the functions important to most home users, including Web browsing, e-mail, playing music and video, and running common applications such as word processing software. And for those interested in eventually upgrading their operating system, Windows Vista Home Basic would cost less than the

³ Unlike the extensive consumer education efforts that occurred during the time that most of the proposed class (including the named plaintiffs) purchased their "Windows Vista Capable" PCs, plaintiffs' DVD containing a Windows Vista television commercial has no bearing on this lawsuit: the type of commercial for Windows Vista that plaintiffs submitted did not even begin airing until February 2007—after the class period. *See* Chan Decl. ¶¶ 3-5. Further, the actual commercial plaintiffs submitted did not air until April 20, 2007, many months after they bought their PCs. *Id.* ¶ 4.

1 premium Windows Vista editions, while still providing these material improvements and
 2 extra features. *See* Gatchalian Decl. ¶¶ 6-7.

3 **C. Ms. Kelley's and Mr. Hansen's Dissimilar PC Buying Experiences**
 4 **Illustrate the Inevitable Variations in Potential Class Members' Claims.**

5 Dianne Kelley bought a Dell laptop so her daughter could use it while attending Skagit
 6 Valley College. Kelley Dep. 22-23. (The Rummage Declaration attaches excerpts of the
 7 named plaintiffs' depositions as Exhibits D and E.) Her daughter does not play advanced
 8 games that require premium graphics hardware, but instead uses her PC for basic tasks, such
 9 as surfing the Web, e-mail, homework, and one game. *Id.* 23, 35-36.

10 Ms. Kelley shopped for her daughter's PC for a year, visiting retail stores and OEM
 11 Web sites. Kelley Dep. 33-34. She admitted that she did not see the "Windows Vista
 12 Capable" sticker before she bought her Dell Inspiron B130 laptop on November 24, 2006, and
 13 it therefore played *no* role in her decision to purchase that computer. *See* Kelley Dep. 42, 65.
 14 In fact, the Dell laptop's price was the principal reason she bought that bargain PC. *Id.* 38.
 15 (*Consumer Reports* in November 2006 described this PC as a "great choice for a rudimentary
 16 laptop or a second PC." Rummage Decl., Ex. A at 14.) She knew nothing about Windows
 17 Vista when she bought her PC, and she had no expectation that her new PC would run
 18 Windows Vista or any feature that Windows Vista might offer, including Aero. *Id.* 15, 42,
 19 44-45, 49, 64. Although her claim (and that of the proposed class) centers on the allegedly
 20 misleading "Windows Vista Capable" sticker, Ms. Kelley did not even see the sticker until
 21 long *after* buying the PC when her sister (calling at the behest of her husband, a lawyer
 22 working on this case) asked if her laptop had a "Windows Vista Capable" sticker. *Id.* 6, 50,
 23 64. The question (and the sticker) meant nothing to her even then. *Id.* 50, 64.

24 Later, in the spring of 2007, Ms. Kelley bought two Acer PCs with Windows Vista
 25 Home Premium pre-installed. *Id.* 44-45. Her daughter was impressed with Ms. Kelley's new
 26 Aero user-interface. Ms. Kelley then consulted the "upgrade advisor" on Microsoft's Web
 27 site (which had been available since May 2006) and learned her daughter's computer could

1 not support Aero. *Id.* 11, 45-46. Even though her daughter's inexpensive PC continues to
2 perform every function she hoped it would perform when Ms. Kelley bought it, *id.* 45, she
3 nevertheless permitted her brother in law's co-counsel to bring this lawsuit in her name.

4 By contrast, Mr. Hansen testified that he saw the "Windows Vista Capable" logo
5 before he bought his Toshiba laptop from CompUSA through Amazon.com on December 22,
6 2006. *See* Hansen Dep. 42-43. He visited some Web sites—possibly Toshiba's and
7 Microsoft's—before making his purchase. *Id.* 38-39. Mr. Hansen does not recall seeing the
8 pages on either of those Web sites that explained what "Windows Vista Capable" meant. *Id.*
9 40, 87-88. Mr. Hansen subscribed to and read *PC World* monthly and read a daily PC
10 newsletter e-mailed to him. *Id.* 26. At least three articles about the WVC Program were
11 featured in *PC World* and that newsletter. *See* Rummage Decl. ¶ 2 & Ex. A at 25, 40, 46, 48.

12 Mr. Hansen now has a Premium Ready PC: he spent \$74.99 for additional memory in
13 April 2007 to improve the performance of his \$799 PC—though he admitted that he could
14 have purchased enough memory to make his PC Premium Ready for \$49.99. Hansen Dep.
15 57. (The record does not show how much more Mr. Hansen would have had to pay for a
16 Premium Ready PC in the first place.) He bought the memory because "the trade articles and
17 everybody said you really need to put more memory in if you're gonna run Vista." *Id.*

18 Neither Ms. Kelley nor Mr. Hansen participated in the Express Upgrade program,
19 which gave some buyers of Windows XP-based PCs the right to a free or discounted upgrade
20 to Windows Vista. *See* Kelley Dep. 56; Hansen Dep. 84. Indeed, neither plaintiff has ever
21 installed or used Windows Vista on their PCs. Kelley Dep. 47; Hansen Dep. 29. Because he
22 bought additional memory, Mr. Hansen could upgrade to Windows Vista Home Premium if
23 he wished. But as he is currently unemployed, he does not want to spend the money. *Id.* 19,
24 58. His PC, with Windows XP pre-installed, does everything he needs satisfactorily. *Id.* 35.

25 Despite the stark contrasts in what these two named plaintiffs saw and understood
26 before purchasing their PCs, and despite their different reasons for buying the PCs they chose,
27 they claim to be similarly situated with each other and with every person who bought a PC

1 that had a small "Windows Vista Capable" sticker on it. Not true. In fact, as their testimony
 2 shows, only individual examination of each potential class member can answer the questions
 3 central to this case, i.e., (a) Did the purchaser see the WVC sticker? (b) Did the purchaser
 4 know what "Windows Vista Capable" meant from the resources created to educate
 5 consumers? (c) Did the WVC sticker play any role in the purchaser's decision to buy the PC?

6 III. ARGUMENT

7 Plaintiffs have not met their burden of satisfying all the requirements of Rule 23. *See*
 8 *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (moving party bears
 9 burden on each element of Rule 23). Before certifying a class, a court must conduct a
 10 "rigorous analysis" to ensure that plaintiffs have satisfied the Rule 23 factors. *Gen. Tel. Co. v.*
 11 *Falcon*, 457 U.S. 147, 161 (1982). In doing so, the Court must look beyond the pleadings to
 12 "understand the claims, defenses, relevant facts, and applicable substantive law in order to
 13 make a meaningful determination of the class certification issues." *Castano v. Am. Tobacco*
 14 *Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *LaCasse v. Wash. Mut., Inc.*, 198 F. Supp. 2d 1255,
 15 1260-61 (W.D. Wash. 2002) (Zilly, J.). The fact that plaintiffs propose a class action "does
 16 not in any way alter the substantive proof required to prove up a claim for relief [E]ach
 17 plaintiff must still prove that [the alleged violation occurred] and that it did in fact cause him
 18 injury." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978). *See also*
 19 *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005) ("It is axiomatic that Rule 23
 20 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation.").

21 A. Individual Fact Questions Concerning Causation and Injury Will 22 Predominate over Any Common Questions in This Litigation.

23 Plaintiffs ask the Court to certify a class under Rule 23(b)(3), which requires a court to
 24 find that "questions of law or fact common to the members of the class predominate over any
 25 questions affecting only individual members." Under this subsection, a court may not certify
 26 a class when "determin[ing] causation and damages [requires] many triable individual issues
 27

1 [to be] presented.” *Zinser*, 253 F.3d at 1189; *see also Wright v. Fred Hutchinson Cancer*
 2 *Research Ctr.*, 2001 WL 1782714 (W.D. Wash. Nov. 19, 2001) (Lasnik, J.) (same).

3 Plaintiffs’ proposed class would pursue a claim of damages under the Consumer
 4 Protection Act (“CPA”), RCW 19.86.010 *et seq.*, and a claim of unjust enrichment. Second
 5 Am. Compl. [Dkt. No. 29] ¶¶ 8.6, 9.2. To prove their statutory claim, plaintiffs would have to
 6 show, *inter alia*, that (1) every class member was subject to a deceptive act that (2) caused his
 7 or her injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
 8 792-93 (1986). To prove unjust enrichment, plaintiffs must establish, *inter alia*, that each
 9 class member conferred a benefit on Microsoft “under such circumstances as to make it
 10 inequitable for the defendant to retain the benefit without payment of its value.” *Bailie*
 11 *Comm’ns, Ltd. v. Trend Bus. Sys. Inc.*, 61 Wn. App. 151, 159-60 (1991) (quotation omitted).

12 A plaintiff must prove causation on a claim for damages under the CPA. “A causal
 13 link is required between the unfair or deceptive acts and the injury suffered by the plaintiff.”
 14 *Indoor Billboard*, 2007 WL 3025836, at *12; *see also Hangman Ridge*, 105 Wn.2d at 793. In
 15 *Indoor Billboard*, the Supreme Court explained that “[a] plaintiff must establish that, but for
 16 the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”
 17 2007 WL 3025836, at *12 ; *see also* Wash. Pattern Jury Instr. Civ., WPI 310.07 (5th ed.
 18 2004) (proximate cause for CPA is a “cause which in direct sequence produces the injury
 19 complained of and without which such injury would not have happened”). The *Indoor*
 20 *Billboard* court expressly rejected the causation argument that plaintiffs make here, i.e., that
 21 causation “inhere[s] in the very act of purchasing Microsoft’s product.” Pls.’ Mot. at 22.

22 Responding to the same argument, the Supreme Court explained:

23 Indoor Billboard [the plaintiff] urges us to adopt a per se rule and hold
 24 that payment of Integra’s invoice is per se sufficient to establish the
 25 proximate cause of plaintiff’s damages. We reject Indoor Billboard’s
 26 per se rule because mere payment of an invoice may not establish a
 causal connection between the unfair or deceptive act or practice and
 plaintiff’s damages.

27 2007 WL 3025836, at *12.

Here, plaintiffs allege they “suffered harm” as a result of “Microsoft’s alleged unfair and deceptive marketing.” Pls.’ Mot. at 14. They contend that all class members suffered “harm” because they bought “a PC certified ... as ‘Windows Vista Capable’ when the PC, in fact,” did not have the capacity to run the features of the premium editions of Windows Vista.⁴ *Id.* But plaintiffs cannot show causation (or, for that matter, unjust enrichment) on a classwide basis, for they cannot prove through their own cases that *every* potential class member would not have suffered the claimed harm—*i.e.*, they would not have purchased the exact same PC—but for “Microsoft’s alleged unfair and deceptive marketing.”

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See Moline Decl. ¶¶ 6, 7. Because of that, one cannot presume that the “Windows Vista Capable” logo—which denotes a PC’s ability to be upgraded to a new operating system—made a difference in PC buyers’ purchasing decisions. Proving causation, injury and unjust enrichment therefore would require proof that each proposed class member saw the WVC sticker, each did not know what it really meant, and each bought a PC that they would not have bought had they known that its operating system in the future could not be upgraded to run a premium edition of Windows Vista, which had not yet been released. These questions present intrinsically individual issues that the Court cannot resolve on a classwide basis.

1. The Combination of Information Made Available to Consumers by Microsoft, OEMs, Retailers and the Media Requires Denial of Certification.

Microsoft, OEMs, retailers, and journalists made extensive and frequent public disclosures about the WVC program. Any potential class member who read these disclosures, and thus knew and understood what it meant for a PC to be “Windows Vista Capable,” cannot establish that the WVC program was the “but for” cause of any harm. *See Sheldon v. American States Preferred Ins. Co.*, 123 Wn. App. 12 (2004) (policyholders could not establish harm under CPA when challenged service fee was fully disclosed and voluntarily

⁴ Plaintiffs spin the issues by calling the premium editions of Windows Vista the “real version[s] of Vista,” as if they had the right to define Microsoft’s products. Pls.’ Mot. 14. In fact, Windows Vista Home Basic remains a distinct product commonly preinstalled by OEMs. *See Rummage Decl., Ex. C.*

1 paid); *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104 (2001) (plaintiffs could
 2 not establish causal connection under CPA where undisputed evidence showed that
 3 defendants disclosed separate concession charge).⁵ But the fact of any potential class
 4 member's knowledge can be established only on an individual basis. That being the case,
 5 common issues do not predominate, as many courts have held in similar circumstances.

6 In *Wright*, for example, plaintiffs alleged that the Fred Hutchinson Cancer Center
 7 violated the CPA by misrepresenting in advertisements and promotional materials facts about
 8 a bone marrow transplant study. Judge Lasnik denied class certification and explained:

9 Although plaintiffs correctly point out that there are common issues
 10 of law or fact regarding almost all of their claims, the number of
 11 individual issues that would have to be determined before any
 12 particular class member could establish liability and/or recover
 13 damages outweighs the common issues. For example, if the
 14 factfinder were to determine that advertising or promotional materials
 15 disseminated by defendant ... were deceptive, issues would arise
 16 regarding whether the decedents relied on those deceptive practices,
 17 whether they caused injury to the individual plaintiffs, and the amount
 18 of damages.

19 2001 WL 1782714, at *3(citing *Hangman Ridge*, 105 Wn.2d at 784-93).

20 Other courts likewise have denied class certification where the record showed that
 21 individual inquiries would be necessary to determine whether an allegedly deceptive ad
 22 caused harm to a putative class member. For example, in *Poulos v. Caesars World, Inc.*, 379
 23 F.3d 654 (9th Cir. 2004), the Ninth Circuit affirmed the denial of class certification because
 24 individual issues predominated in proving proximate causation. Potential class members had
 25 to prove damage caused by alleged misrepresentations concerning electronic poker and slot
 26 machines. As here, they could do so only individually because their reasons for gambling,
 27 their information about the machines at issue, and whether the alleged misrepresentations had
 any effect on their decisions to use those machines necessarily varied from person to person.

⁵ See also *Villasenor v. American Signature, Inc.*, 2007 WL 2025739, *4 (N.D. Ill. July 9, 2007)
 (dismissing claim under Illinois Consumer Fraud Act where plaintiff "knew the truth" about finance
 charges that defendant allegedly failed to disclose); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213
 (Ill. 2004) (homeowners who brought action against siding manufacturer unable to recover under
 Illinois Consumer Fraud Act where deception not a cause of their damages "because they knew that
 siding damage had occurred and, therefore, that it was subject to deterioration").

1 *Id.* at 665-66. *See also* *Lozano v. AT&T Wireless Services, Inc.*, 2007 WL 2728758, at *14
 2 (9th Cir. Sept. 20, 2007) (Robart, J.) (trial court denied certification on deception claim under
 3 California Consumers Legal Remedies Act ("CLRA") because court "would have to conduct
 4 an individualized review as to each class member's awareness and knowledge of out-of-cycle
 5 billing and [AT&T's] disclosures to determine whether its representations were material").⁶

6 In *Oshana v. The Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005), plaintiff alleged
 7 that Coca-Cola engaged in a deceptive marketing scheme and was unjustly enriched by
 8 misleading consumers into believing that Diet Coke from a fountain was the same as Diet
 9 Coke in a can or bottle. *Id.* at 578. In fact, bottled Diet Coke is sweetened exclusively with
 10 aspartame, while fountain Diet Coke is sweetened with a mixture of aspartame and saccharin.
 11 *Id.* The court rejected plaintiff's argument that "the mix of representations seen by the class
 12 members is irrelevant and insufficient to preclude certification." *Id.* at 586. "To establish
 13 proximate causation," the *Oshana* court wrote,

14 each individual must provide evidence of his or her knowledge of the
 15 deceptive acts and purported misstatements. ***This showing requires***
 16 ***an individual analysis of the extent to which Coca-Cola's marketing***
 17 ***played a role in each class member's decision to purchase fountain***
 18 ***diet Coke. Without determining what each member heard, saw, or***
 19 ***knew, it is impossible to assign liability.*** ... Each potential class
 member likely had varying degrees of knowledge, if any, regarding
 fountain diet Coke's contents due to varying exposure to various
 representations. These highly individualized factual determinations
 preclude certification.

20 *Id.* (emphasis added). "The same analysis applies to *Oshana's* unjust enrichment claim." *Id.*
 21 The Seventh Circuit affirmed, explaining that "*Oshana's* proposed class ... could include
 22 millions who were not deceived and thus have no grievance under the ICFA. Some people
 23 may have bought fountain Diet Coke *because* it contained saccharin, and some people may
 24 have bought fountain Diet Coke *even though* it had saccharin. Countless members of

25 ⁶ The Ninth Circuit in *Lozano* affirmed certification under the abuse of discretion standard of an
 26 unfairness claim brought under California's Unfair Competition Law ("UCL"), even though it "might
 27 have decided the issue differently." Because the UCL claim was limited to uniform written
 disclosures made to all customers, the district court found that individual circumstances did not
 destroy predominance. *Id.* at *16. Here, as with the CLRA claim that was not certified, the Court must
 consider evidence of the many different disclosures potential class members might have received.

Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception." 472 F.3d 506, 514 (7th Cir. 2006) (emphasis in original).

Similarly, in *Hutson v. Rexall Sundown, Inc.*, 837 So.2d 1090 (Fla. Dist. Ct. App. 2003), plaintiffs alleged that the labeling and advertising of products known as "Calcium 900" and "Calcium 1200" deceptively misrepresented that each tablet contained 900 and 1200 milligrams of calcium, respectively, and that these practices unjustly enriched the defendant. *Id.* at 1091. The trial court denied certification because those "who read the labels could not claim damages because they had actual knowledge of the specific number of tablets needed to be taken per serving." *Id.* at 1092-93. The Court of Appeal affirmed, holding that "a person who had actual knowledge of the number of [tablets] needed to be taken per serving [to receive 900 or 1200 milligrams of calcium] would not have suffered any damages as a result of the alleged deceptive trade practice and, therefore, would have no cause of action." *Id.*

Wright, Poulos, Oshana and *Hutson*, as well as many other cases, instruct that where the mix of information available to consumers shows that some class members probably were made aware of the truth and nevertheless went ahead with the transaction (*i.e.*, bought the "Windows Vista Capable" PC), a court cannot certify a class under Rule 23(b)(3). In these circumstances, only individual inquiries could distinguish between those who acted knowing exactly what they were getting and those (if any) who acted because of the supposed deception. *Indoor Billboard*, 2007 WL 3025836 at *12; *Hangman Ridge*, 105 Wn.2d at 793.

2. The Fact That Many Potential Class Members, Including Ms. Kelley, May Not Have Seen the "Windows Vista Capable" Logo before Buying Their PCs Forecloses Certification.

Ms. Kelley's testimony shows that she decided to buy her PC without seeing the "Windows Vista Capable" sticker, which is not surprising given its size and location. *See* Kelley Dep. Exs. 4, 5 (showing sticker in lower right hand corner of Ms. Kelley's laptop). That fact provides yet another reason to find a lack of predominance: when plaintiffs cannot prove on a classwide basis that all class members even *saw* the allegedly deceptive advertising, individual issues of causation and injury make class certification inappropriate.

1 Many cases stand for this common sense proposition. In *Solomon v. Bell Atl. Corp.*,
 2 777 N.Y.S.2d 50 (N.Y. App. Div. 2004), plaintiff alleged deceptive advertising against
 3 Verizon concerning claims Verizon allegedly made about its DSL Internet access service. *Id.*
 4 at 53. New York's intermediate appellate court reversed certification because "[p]laintiffs
 5 have not demonstrated that all members of the class saw the same advertisements" and thus
 6 could not show that all class members had been misled. *Id.* at 55-56. Like Ms. Kelley, "some
 7 saw no advertisements at all," and "the content of defendants' DSL advertising varied widely
 8 and not all the advertisements contained the alleged misrepresentations. Thus, questions of
 9 individual members' exposure to the allegedly deceptive advertising predominate." *Id.*
 10 Further, the putative class members had "alternative sources of information about DSL
 11 service," including word of mouth, "computer magazines," the subscriber agreement, and a
 12 free trial period. *Id.* As here, "individual trials would be required to determine whether a
 13 reasonable consumer acting reasonably in each plaintiff's circumstances would have been
 14 misled by defendants' representations." *Id.* (citations omitted).

15 Similarly, in *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151 (Ill. 2002), a consumer
 16 brought a putative class action against Amoco under Illinois' Consumer Fraud Act, alleging
 17 that the company deceptively advertised premium gasoline. Plaintiff argued that each
 18 putative class member was injured simply by purchasing the gasoline, regardless of whether
 19 the class member saw the advertisements. The Illinois Supreme Court disagreed, holding that
 20 "to properly plead the element of proximate causation in a private cause of action for
 21 deceptive advertising brought under the Act, a plaintiff must allege that he was, in some
 22 manner, deceived." *Id.* at 164; *see also Gonzalez v. Proctor and Gamble Co.*, 2007 WL
 23 2700954 (S.D. Cal. Sept. 12, 2007) (plaintiff could not pursue deceptive advertising claims
 24 absent evidence she saw allegedly deceptive commercials); *Weinberg v. Sun Co., Inc.*, 777
 25 A.2d 442, 446 (Pa. 2001) ("[T]here is no authority which would permit a private plaintiff to
 26 pursue an advertiser ... when the plaintiff was neither deceived nor influenced"); *Fink v.*
 27 *Ricoh Corp.*, 839 A.2d 942, 959-60, 975-76 (N.J. Super. Ct. Law Div. 2003) (denying

1 certification of nationwide class absent “proof that all or even a substantial number of ...
 2 purchasers ... had read and interpreted the ... advertisements in a manner similar to that of
 3 plaintiffs in this case or that their purchases were caused to any extent by [the] allegedly false
 4 representations or concealments of material facts”).⁷

5 Here, Ms. Kelley’s testimony shows that she—like at least some of the proposed
 6 class—never saw the WVC sticker that plaintiffs claim was deceptive. Before buying her PC,
 7 Ms. Kelley had never even heard of Vista or the term “Windows Vista Capable”:

8 Q. Now, a few minutes ago I asked you the question of whether
 9 during your shopping you came across the term ‘Windows Vista
 10 Capable.’ ... And I believe you said that you didn’t think you did; is
 that right?

11 A. Yes.

12 Q. When you purchased the Dell Inspiron that Friday after
 13 Thanksgiving, were you aware that it was labeled a Windows Vista
 Capable PC?

14 A. I had no idea what Vista was.

15 Q. So the answer to that is you were not aware it was labeled a
 Windows Vista Capable PC?

16 A. I was not aware of anything involving Vista because Vista had
 17 not been released. I didn’t know anything about it.

18 Kelley Dep. 41-42.

19 Microsoft has the right to cross-examine every member of the putative class to
 20 determine whether they, like Ms. Kelley, never saw the WVC logo and did not buy with
 21 Windows Vista in mind. And if Microsoft established that fact on cross-examination, the jury

22 ⁷ Even assuming a potential class member saw the small WVC logo before buying a PC and came to a
 23 conclusion as to what it meant, the jury would need to determine whether the logo was the proximate
 24 cause of the alleged harm. The potential class member could have purchased the PC for reasons
 25 having nothing to do with Windows Vista, including (most obviously) price and a disinclination to pay
 26 for more advanced hardware. *See, e.g., Philip Morris USA Inc. v. Hines*, 883 So.2d 292, 294 (Fla.
 27 Dist. Ct. App. 2003) (“the smoker’s reasons for choosing to smoke ‘light’ cigarettes” presents
 individual issue defeating certification); *Davies v. Philip Morris U.S.A., Inc.*, 2006 WL 1600067, *3
 (Wash. Super. Ct. 2006) (same); *Pratt v. Panasonic Consumer Elec. Co.*, 2006 WL 1933660, *8 (N.J.
 Super. Ct. Law Div. July 12, 2006) (denying certification of a class allegedly deceived into purchasing
 defective DVD players: “Plaintiff failed to provide any evidence of what, or even whom, caused the
 prospective class members to purchase the subject DVD player”).

1 could well find in Microsoft's favor based on that individual testimony. Because plaintiffs
 2 cannot prove on a classwide basis that all putative class members saw the sticker, let alone
 3 were influenced by it, the Court should deny certification.

4 **3. Plaintiffs' Arguments That This Case Involves a "Defective"**
 5 **Product and "Fraud on the Market" Do Not Cure Their Inability**
 to Establish Causation and Injury with Common Evidence.

6 Having known all along what Microsoft just discovered, *i.e.*, that Ms. Kelley bought
 7 her PC without knowing anything about Windows Vista and without seeing the WVC sticker,
 8 plaintiffs attempt to deflect attention from the individual nature of their claims by implying
 9 that this case revolves around the allegation that Windows Vista Home Basic—which neither
 10 plaintiff has ever installed or used on the PCs at issue—was a “defective” operating system.
 11 Although this claim does not appear anywhere in their complaints, plaintiffs cite *Microsoft*
 12 *Corp. v. Manning*, 914 S.W.2d 602, 611-12 (Tex. Ct. App. 1995), for the proposition that “a
 13 Texas court of appeals held that alleged defects in a prior Microsoft operating system and
 14 Microsoft's alleged omission to end-users regarding the same were common factual
 15 questions.” Pls.' Mot. at 11. Plaintiffs also cite *In re St. Jude Medical, Inc. Silzone Heart*
 16 *Valves Prods. Liab. Litig.*, 2003 WL 1589527 (D. Minn. Mar. 27, 2003), asserting that “the
 17 factual question whether a defendant manufactured a defective heart valve sufficed to
 18 establish commonality supporting certification of a nationwide consumer class under
 19 Minnesota's CPA” relating to allegedly deceptive marketing of the product. *Id.*

20 Plaintiffs' reliance on *Manning* and *St. Jude*, including their attempt to recast their
 21 claim as one involving a “defective” operating system, is both misleading and ineffective.
 22 Unlike in *Manning* and *St. Jude*, plaintiffs' complaint does not allege that Microsoft produced
 23 a “defective” operating system (nor could they make such an allegation consistent with Rule
 24 11). *See Manning*, 914 S.W.2d at 605 (alleging Microsoft released operating system with
 25 faulty disk compression software that destroyed data); *St. Jude Medical, Inc.*, 2003 WL
 26 1589527, at *2 (claiming that defendant manufactured defective heart valve). Moreover,
 27 plaintiffs fail to mention that the trial court in *Manning* *decertified the class sua sponte*

1 shortly after the Texas Supreme Court granted Microsoft's request for further review,
2 negating the significance of that case. See Yoxall Decl. ¶¶ 9, 10 & Ex. E.

3 Plaintiffs also obliquely invoke a "fraud on the market" or "price inflation" theory of
4 causation lifted from securities cases, in hopes of avoiding the individual issues that their
5 claims inevitably create. According to plaintiffs, "Microsoft's unfair and deceptive conduct
6 regarding 'Vista' capability—conduct common to all claims—also created artificial demand,
7 at artificially maintained prices, for PCs that were not truly 'Vista capable' and, thus, were
8 rendered less valuable or obsolete upon the release of Vista." Pls.' Mot. at 14.

9 The courts have rejected this theory in these circumstances: *Oliveira*, *Weinberg*, and
10 *Fink* each discusses and rejects the "fraud on the market" theory of causation in deceptive
11 advertising cases.⁸ The record shows that Microsoft, OEMs, and retailers throughout the class
12 period *did* disclose to the consumer market extensive information about what "Windows Vista
13 Capable" meant. Thus, even if plaintiffs could prove that the personal computer market is
14 "efficient" in the sense that prices of WVC PCs, like securities, respond quickly to
15 disclosures—which they could not and have not tried to establish—the market would have
16 absorbed this information and the price of WVC PCs would have adjusted accordingly, so
17 they would have suffered no damage. Plaintiffs' passing reference to an undeveloped "fraud
18 on the market" theory does not give them a shortcut around causation.

19 **B. The Named Plaintiffs' Claims Are Not Typical of Any Claim That**
20 **Potential Class Members in the Express Upgrade Program May Have.**

21 Rule 23(a)(3) provides that the "claims or defenses of the class representative must be
22 typical of the claims or defenses of the class." A plaintiff's claim satisfies this requirement if
23 all other members of the proposed class have the same injuries, the action is based on conduct
24 which is not unique to the named plaintiffs, and other class members have been injured by the

25 ⁸ The "fraud on the market" theory requires plaintiffs to allege, and make a threshold showing at the
26 class certification stage, that the market at issue is "efficient" (that is, that it quickly absorbs
27 information thus causing price to move promptly in response to that information). See, e.g., *Gariety v.*
Grant Thornton, LLP, 368 F.3d 356, 364-69 (4th Cir. 2004); *In re PolyMedica Corp. Secs. Litig.*, 432
F.3d 1, 17 (1st Cir. 2005); *Prohios v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1336-37 (S.D. Fla. 2007).
Here, plaintiffs have not made any such allegation or showing.

1 same conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In practical
2 terms, “[t]he premise of the typicality requirement is simply stated: as goes the claim of the
3 named plaintiff, so go the claims of the class.’ Where the premise does not hold true, class
4 treatment is inappropriate.” *O’Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 412 (C.D. Cal.
5 2000) (quoting *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998)).

6 Courts frequently find typicality lacking where a named plaintiff’s deceptive
7 advertising claim relates to a different product or transaction than the product or transaction
8 asserted by proposed class members. For example, plaintiff in *Gonzalez* alleged that Pantene
9 hair products did not strengthen hair as advertised. 2007 WL 2700954 at *1. The court
10 denied class certification on the ground that plaintiff’s claim was not typical of the claims of
11 proposed class members “because the evidence in the record shows that the product Plaintiff
12 purchased was not the subject of specific hair strengthening claims during the proposed class
13 period.” *Id.* at *3. Thus, even though Pantene’s maker may have made representations about
14 other hair products, plaintiff’s claim was not typical because she did not purchase those
15 products. *See also Hutson*, 837 So.2d at 1093 (plaintiffs who bought Calcium 900 but not
16 Calcium 1200 could not maintain an action on behalf of those who bought Calcium 1200
17 “because [plaintiffs] could not have maintained such an action individually”).

18 This Court should reach the same result here. Neither Ms. Kelley nor Mr. Hansen
19 bought a PC that came with an “Express Upgrade” to Windows Home Basic. A proposed
20 class member who complains that the “Express Upgrade” program was deceptive—because,
21 for example, that person alleges being misled about the Windows Vista edition for which he
22 or she was getting a free or reduced-price upgrade—is asserting a different claim than the
23 named plaintiffs’ claim here (*i.e.*, that the WVC sticker deceived them about the capabilities
24 of their PCs). The jury could not possibly decide the claims of these named plaintiffs and
25 thereby decide whether *every* person who received a reduced-price upgrade to Windows Vista
26 Home Basic believed that the operating system included features available only in Windows
27 Vista Home Premium.

1 Plaintiffs' Express Upgrade claims present the same individual causation and injury
 2 questions as their claims about the WVC program generally (because, as the record shows,
 3 Microsoft, OEMs, retailers, and others disseminated a wealth of information about the
 4 Express Upgrade program). But because Ms. Kelley and Mr. Hansen do not have standing to
 5 assert the separate claims of the proposed "Express Upgrade" class, and because Express
 6 Upgrade claims will not rise or fall with the claims of Ms. Kelley and Mr. Hansen, the named
 7 plaintiffs also do not satisfy the "typicality" requirement for "Express Upgrade" claims.

8 **C. Individual Questions of Law Predominate.**

9 Microsoft incorporates its Opposition to Plaintiffs' Motion for Application of
 10 Washington Law, which explains why the inability to apply a single state's law forecloses
 11 certification of a nationwide class.

12 **D. Plaintiffs Fail to Satisfy Rule 23(b)(3)'s Superiority Requirement.**

13 Under Rule 23(b)(3), plaintiffs must show that that a class action is "superior to other
 14 available methods for the fair and efficient adjudication of the controversy." "[W]hen the
 15 complexities of class action treatment outweigh the benefits of considering common issues in
 16 one trial, class action treatment is not the 'superior' method of adjudication." *Zinser*, 253
 17 F.3d at 1192 (finding no superiority where "each class member has to litigate numerous and
 18 substantial separate issues to establish his or her right to recover individually").

19 Plaintiffs' conclusory arguments do not meet their burden. The bulk of the work in
 20 this case—for the Court, jury, and parties—will be spent on the myriad individual issues that
 21 arise from the claim that a supposedly deceptive act by Microsoft operated as the "but for"
 22 cause of harm to an individual who bought a computer bearing the WVC logo. Certifying a
 23 class will not relieve the parties of the burden of proving or disproving these individual issues
 24 and would force this Court to conduct countless mini-trials before the same jury to resolve all
 25 the claims and defenses. *Oshana*, 255 F.R.D. at 586 (denying certification in deceptive
 26 advertising case because of "[t]he obvious difficulties in managing" an action where each
 27 class member's claims would require individual inquiries); *Gartin v. S&M Nutec LLC*, 2007

1 WL 1424654, *10 (C.D. Cal. Apr. 4, 2007) (denying certification in deceptive advertising
 2 case where, inter alia, individual causation issues would make the case unmanageable); *see*
 3 *also In re Hotel Telephone Charges*, 500 F.2d 86, 90-91 (9th Cir. 1974) (reversing class
 4 certification on manageability grounds where proposed class “virtually insured that the
 5 litigation would be intolerably time-consuming and, because of the legal nature of the claims,
 6 involve a great variety of individual questions”).

7 IV. CONCLUSION

8 For the foregoing reasons and the additional reasons set forth in Microsoft’s
 9 Opposition to Plaintiffs’ Motion to Apply Washington Law, Microsoft respectfully asks the
 10 Court to deny Plaintiffs’ Motion for Class Certification.

11 DATED this 19th day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2007, I electronically filed the foregoing redacted version of Microsoft's Brief in Opposition to Plaintiffs' Motion for Class Certification with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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